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7 UNITED STATES DISTRICT COURT
8 CENTRAL DISTRICT OF CALIFORNIA
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10 SANFORE ANDERSON,

11 Petitioner,

12 v.

13 L.S. McEWEN, Warden,

14 Respondent.
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Case No. EDCV 10-0782-CAS (JEM)

**ORDER ACCEPTING FINDINGS,
CONCLUSIONS AND RECOMMENDATIONS
OF UNITED STATES MAGISTRATE JUDGE**

16 **INTRODUCTION**

17 On May 27, 2010, Sanfore Anderson ("Petitioner"), a prisoner in state custody, filed a
18 Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. Section 2254 ("Petition"). On September
19 21, 2010, Respondent filed an Answer and lodged the pertinent state records. On October 6,
20 2010, Petitioner filed a Reply.

21 On June 19, 2013, the United States Magistrate Judge issued a Report and
22 Recommendation ("R&R"), recommending that the Petition be dismissed with prejudice.

23 On June 27, 2013, Petitioner filed a "Motion for Stay and Abeyance to Present
24 Unexhausted Claim and New Evidence in State Court" ("Motion").

25 On August 5, 2013, Petitioner filed Objections to the R&R ("Objections").

26 **DISCUSSION**

27 In his Motion, Petitioner requests that the Court stay this matter in order for him to return
28 to state court to exhaust the following three claims: (1) the prosecutor committed misconduct

1 when he advanced the theory that Petitioner could be found guilty inter alia for aiding and abetting
 2 Erin Decker ("Erin") in the murder of Paula Decker ("Paula"), which was inconsistent with Erin's
 3 prior conviction as an accessory after the fact to Paula's murder, and the prosecutor thus
 4 "deceptive[ly]" argued "something he did not believe", i.e., that Erin was the direct perpetrator of
 5 Paula's murder, to secure Petitioner's conviction (Claim One), (Motion at 4-14); (2) Petitioner's trial
 6 counsel provided ineffective assistance when he failed to impeach the jailhouse informant's
 7 testimony of Petitioner's confession to him that he murdered Paula, allegedly premised on their
 8 fraternization based on common gang affiliation, through either a stipulation from the prosecution
 9 that it had no evidence of Petitioner's gang membership, or evidence contained in Petitioner's
 10 Department of Corrections ("CDC") Central File indicating that Petitioner had "no gang affiliation"
 11 (Claim Two), (Motion at 15-17); and (3) the trial court committed prejudicial misconduct when it
 12 expressed dissatisfaction with the evidentiary rulings made by the judge in Petitioner's prior trials
 13 and with the prosecutor's decisions regarding presentation of witnesses, and offered the
 14 prosecutor "helpful hints" concerning the presentation of evidence that were designed to help
 15 secure Petitioner's conviction (Claim Three), (Motion at 18-20). For the following reasons,
 16 Petitioner's Motion is denied.

17 As an initial matter, Petitioner did not file this Motion until more than three years after he
 18 filed his Petition. Petitioner's only explanation for this delay is that he "just bec[a]me aware of the
 19 Court's decision in Cullen v. Pinholster, – U.S. –, 131 S.Ct. 1388 . . . (2011)[.]"¹ Because
 20 Petitioner failed to act diligently and filed this Motion in such an untimely manner, the Motion
 21 should be denied. See Rhines v. Weber, 544 U.S. at 277-78 (a stay is only appropriate when the
 22 district court determines there are no intentionally dilatory litigation tactics by the petitioner); King
 23 v. Ryan, 564 F.3d 1133, 1141 (9th Cir. 2009) ("district courts retain the same degree of discretion
 24 they had before Rhines to implement the Kelly procedure"); see also Faulkner v. Mule Creek State
 25 Prison, 2009 WL 1844329, *2 (E.D. Cal. 2009) (concluding that "because [petitioner] filed his
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27 ¹ Pursuant to Pinholster, review to determine whether a petitioner is entitled to habeas relief
 28 pursuant to 28 U.S.C. § 2254(d)(1) is limited to the record that was before the state court which
 adjudicated the claim(s) on the merits. Id. at 1400.

1 motion to stay in such an untimely manner, the Court exercises its discretion not to implement the
2 *Kelly* procedure”).²

3 In any event, Petitioner's motion must be denied because the claims he wishes to exhaust
4 are either already exhausted or meritless. See Rhines, 544 U.S. at 277-278 (to support motion
5 to stay, unexhausted claim must have merit); Kelly v. Small, 315 F.3d 1063, 1070 (9th Cir. 2003),
6 overruled on other grounds by Robbins v. Carey, 481 F.3d 1143 (9th Cir. 2007) (unexhausted
7 claim must be valid); see also King, 564 F.3d at 1141.

8 Concerning Claims Two and Three, Petitioner appears to argue that these claims are
9 unexhausted based on new factual allegations. In order to properly exhaust state remedies, the
10 specific factual basis of the federal claim must be presented to the highest state court. See Kelly,
11 315 F.3d at 1067-69 (finding unexhausted ineffective assistance of counsel and prosecutorial-
12 misconduct claims where specific instances of ineffectiveness and misconduct asserted in federal
13 petition were neither in the California Supreme Court petition nor discussed by the court of appeal)
14 (overruled on other grounds); see also Gray v. Netherland, 518 U.S. 152, 162-63 (1996) (“[F]or
15 purposes of exhausting state remedies, a claim for relief in habeas corpus must include reference
16 to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the
17 petitioner to relief”). However, new factual allegations will render a claim unexhausted only if they
18 “fundamentally alter the legal claim already considered by the state courts.” Vasquez v. Hillery,
19 474 U.S. 254, 260 (1986). Claims Two and Three are already exhausted because any new factual
20 allegations concerning these claims contained in the Motion do not “fundamentally alter” the legal
21 claims asserted in the Petition and already considered by the state courts.

22 For example, with respect to Claim Two, Petitioner references “Exhibit E” filed in support
23 of his Motion, which is a copy of Petitioner’s CDC 812 Form indicating that Petitioner had no
24 suspected gang affiliations as of May 16, 2001. (Motion at 16.) However, Exhibit K attached to
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26 ² Because the Court finds that Petitioner’s Motion should be denied under either of the two
27 possible analyses by which to decide a motion to stay outlined by the Ninth Circuit, see King, 564
28 F.3d at 1138-1141 (explaining that there are two possible analyses by which to decide a motion
to stay, namely the *Rhines* analysis and the *Kelly* three-step procedure), the Court need not
determine what particular type of stay would be appropriate in Petitioner’s case.

1 the Petition contains equivalent evidence of the CDC's failure to identify Petitioner as a "prison
2 gang" member during the same period. (R&R at 59.) Moreover, the new evidence referenced in
3 the Motion does not alter the Court's conclusion that trial counsel properly attempted to limit the
4 jury's knowledge of Petitioner's history in prison, and introduction of the CDC file into evidence
5 would have undermined this strategy completely. (R&R at 59.) Likewise, with respect to Claim
6 Three, Petitioner provides a copy of a statement allegedly made by the prosecution to the press
7 that it "had learned from past experiences" concerning the presentation of witness testimony.
8 (Motion at 20.) However, this evidence does not alter the Court's conclusion that any comments
9 made by the trial court concerning the presentation of evidence do not establish bias nor did they
10 render Petitioner's trial fundamentally unfair. (R&R at 13-18.) In sum, any new factual allegations
11 concerning Claims Two and Three do not "fundamentally alter" the legal claims asserted in the
12 Petition and already considered by the state courts. (R&R at 10); Vasquez, 474 U.S. at 260.
13 Accordingly, Claims Two and Three have been exhausted and presented in the Petition, and the
14 Motion is denied as moot with respect to Claims Two and Three.

15 Moreover, the Motion is denied with respect to Claim One because this claim is plainly
16 meritless. See Rhines, 544 U.S. at 277-278; Kelly, 315 F.3d at 1070; see also King, 564 F.3d at
17 1141. As stated by the Supreme Court, there is no clearly established federal law that supports
18 the assertion that due process is violated if defendants are prosecuted on inconsistent theories.
19 Bradshaw v. Stumpf, 545 U.S. 175, 190 (2005) (Thomas, J., concurring) ("This Court has never
20 hinted, much less held, that the Due Process Clause prevents a State from prosecuting
21 defendants based on inconsistent theories."); see Nguyen v. Lindsey, 232 F.3d 1236, 1240 (9th
22 Cir. 2000) (recognizing that it is not per se unconstitutional for a prosecutor to present
23 fundamentally inconsistent theories of guilt against co-perpetrators who are tried separately).
24 Even if this were not so, Petitioner concedes that Erin pleaded guilty, (Motion at 4), therefore Erin's
25 conviction was not obtained through a trial, and the prosecutor did not present any theory of
26 criminal liability with respect to Erin, inconsistent or otherwise. See, e.g., Price-Mahdi v. Subia,
27 2010 WL 3910135, *2-*4 (N.D. Cal. 2010) (no due process violation where "[co-perpetrator] had
28 no trial, having pleaded guilty, and therefore the prosecutor did not present any theory of criminal

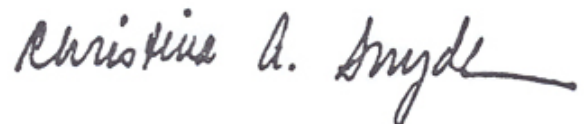
liability, inconsistent or otherwise"). In any event, Petitioner points to nothing in the record to suggest that the prosecutor presented falsified evidence or acted in bad faith. (See, generally, Motion at 4-14); see Nguyen, 232 F.3d at 1240 (a prosecutor's pursuit of fundamentally inconsistent theories in separate trials against separate defendants can violate due process if the prosecutor knowingly uses false evidence or acts in bad faith). Petitioner argues merely that pursuing a theory of guilt against him that is apparently inconsistent with Erin's conviction shows bad faith. (Motion at 11-14.) Yet, as noted above, a prosecutor's pursuit of fundamentally inconsistent theories in separate trials against separate defendants does not in itself violate due process. Stumpf, 545 U.S. at 190; Nguyen, 232 F.3d at 1240. Petitioner's argument that the prosecutor acted in bad faith is unsupported. Accordingly, Claim One is plainly meritless and Petitioner's Motion is denied with respect to this claim. See Rhines, 544 U.S. at 277-78; Kelly, 315 F.3d at 1070; see also King, 564 F.3d at 1141.

CONCLUSION

Pursuant to 28 U.S.C. § 636, the Court has reviewed the Petition, all of the records herein, the Magistrate Judge's Report and Recommendation, and the Objections to the Report and Recommendation. Having made a de novo determination of the portions of the Report and Recommendation to which the Objections were directed, the Court concurs with and accepts the findings and conclusions of the Magistrate Judge. Accordingly, IT IS ORDERED THAT:

1. Petitioner's "Motion for Stay and Abeyance to Present Unexhausted Claim and New Evidence in State Court" is denied with prejudice.
2. Judgment shall be entered dismissing the action with prejudice.
3. The Clerk shall serve copies of this Order and the Judgment herein on the parties.

DATED: August 26, 2013.



CHRISTINA A. SNYDER
UNITED STATES DISTRICT JUDGE